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REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

The right to freedom of opinion and expression

Current problems of its realization and measures necessary for its strengthening and promotion

Update of the preliminary report prepared by Mr. Danilo Türk and Mr. Louis Joinet, Special Rapporteurs, in accordance with Sub-Commission decision 1990/117

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INTRODUCTION

1. On 30 August 1990 the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in its decision 1990/117, took note of the preliminary report prepared by Mr. L. Joinet and Mr. D. Türk on current problems of realizing the right to freedom of opinion and expression and measures necessary for its strengthening and promotion (E/CN.4/Sub.2/1990/11). It decided to postpone consideration of the report to its forty-third session and to ask the Rapporteurs to update it. The Commission on Human Rights adopted resolution 1991/32 of 5 March 1991 in which, among other things, it welcomed the recommendations set forth in chapter IV of the preliminary report. The present paper is accordingly intended to assist the Sub-Commission in its consideration of the preliminary report.

2. In order to place this update in its context, the present paper should be studied with the aforementioned preliminary report in mind, together with the working papers prepared by Mr. L. Joinet in 1987 (E/CN.4/Sub.2/1987/15, annex I) and Mr. D. Türk in 1989 (E/CN.4/Sub.2/1982/26).

3. In the present state of our information, despite the political changes which have recently taken place in many countries, chapters I and II of the preliminary report 1/ do not seem to call for any substantial updating. Mention should, however, be made of the adoption by the Conference on Security and Cooperation in Europe (CSCE) at Copenhagen in June 1990 of the "Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE", which reaffirms inter alia the right to freedom of expression and - of particular interest to us - contains a general clause on the permissibility of restrictions to the rights enumerated.

4. The Rapporteurs' mandate is essentially to bring the preliminary report up to date in order to facilitate its discussion. The updating will be addressed mainly to the following two aspects of the subject:

- Firstly (chapter I), an analysis of further developments since the issue of the preliminary report, introduced by the replies made to the observations invited by the Rapporteurs (see preliminary report, para. 185);

- Secondly (chapter II), an update of some matters discussed in chapter III of the report, 2/ with particular attention to two questions linked to current events; the first of these (A) shows that restrictions may be justified, whereas in the second case (B) they entail serious risks. The two questions are:

  A. Freedom of opinion and expression versus the struggle against racial discrimination (see also preliminary report, chapter IV, para. 184 (4));

  B. Freedom of expression and information in armed conflicts.

I. FURTHER DEVELOPMENTS SINCE THE PUBLICATION OF THE PRELIMINARY REPORT

A. Response to the observations made in the preliminary report

5. In paragraph 185 of the preliminary report, the Rapporteurs expressed the wish to receive observations both from participants in the Sub-Commission's session and from specialist quarters. The comments made testify to the interest aroused by the report.

6. Before examining these comments, the Rapporteurs wish to reaffirm categorically that freedom of opinion and expression is a fundamental right, respect for which affects the exercise of most other rights; the comments which follow should therefore be examined in the light of this categorically restated principle, which has the force of a rule; any permissible restrictions can only be by way of exception.

7. To take an example, the observations made by the World Press Freedom Committee (WPFC), a non-governmental organization (NGO), illustrate some of the reservations encountered by the preliminary report by reason of what it says about the concepts of "restrictions permissible in a democratic society" and "democratic necessity".

8. Would it not be appropriate - asks WPFC - to give priority to freedom of expression and means of promoting it before turning to the restrictions that may be imposed on it? In support of this view, the following arguments are generally put forward:

- Since freedom of expression and freedom of the press are fundamental rights, do not restrictions imposed on journalists or organs of information, whatever they may be, constitute violations of fundamental rights that cannot be left unopposed without running the risk of legitimizing them?

- More specifically, is not any reflection on restrictions, however "permissible in a democratic society", apt - even with the best of intentions - to serve as a justification for those who seek to legitimize emergency measures taken against professionals in the information field?

- Should not future work emphasize means of reducing restrictions rather than consider cases in which such restrictions might be permitted?

9. On the general observation, the Rapporteurs consider that the defence of a freedom necessarily entails readiness to tackle the obstacles in its path; it would be paradoxical, therefore, to imagine that a freedom could be protected without considering - if only in order to be forewarned against them - the restrictions that may be imposed on it; for, as comparative law teaches us, such restrictions occur even in the countries which consider themselves the most democratic.

10. There is no question but that the preliminary report, in reviewing the scope of the international instruments for the protection of that freedom (chapter I, paras. 11-35), the better to emphasize their importance, and in describing the typologies of protection afforded by States Members of the United Nations (paras. 51-62), categorically confirms that freedom of expression and freedom of the press constitute fundamental rights.

11. Whether the Rapporteurs will or no, however, this review of the relevant texts makes it clear a contrario that, taken as a whole, the international instruments concerning freedom of opinion and expression, rightly or wrongly - that is the whole point at issue - provide for possible limitations on condition that those limitations do not call into question the actual principle of the freedom protected. Admittedly the United Nations General Assembly, in its resolution 59 (I) of 14 December 1946, reaffirmed that "Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated".

12. The fact remains that the Universal Declaration of Human Rights of 1948, which in its article 19 protects freedom of expression, opinion and information, also contains in article 29 a general clause on restrictions permissible "in a democratic society".

13. The same applies to article 19 of the International Covenant on Civil and Political Rights, which covers the same ground.

14. Another reference: the case law of the European Court of Human Rights confirms, on the one hand, that freedom of expression constitutes one of the basic foundations of a democratic society, one of the prime conditions for its progress and for the full development of every individual; on the other hand it also emphasizes that freedom of expression may come up against the exercise of other freedoms and that it may not always be easy to set the fundamental rights and freedoms of the person in order of importance.

15. A study of current problems involved in exercising the right to freedom of opinion and expression thus unavoidably raises the question of restrictions on freedom of expression and information; that question can be evaded only by a very naive reading of the international standards or by taking the view that the promotion of freedoms - and hence the promotion of freedom of opinion and expression - can be immediate, total and absolute, whereas history teaches us that it always develops as part of a process of democratization during which the limitations on it, from pressure of opinion to institutional reform, grow less and less restrictive.

16. It was therefore thought appropriate to suggest in the preliminary report that the principles affirmed by the set of international instruments on the protection and promotion of freedom of opinion and expression should be taken as a basis for reflection and for exploring the possible reconsideration of such restrictions and derogations, however "permissible" in a democratic society.

17. It would doubtless be possible to espouse the "pure principle" of John Stuart Mill who on several occasions in the United States provided in the following terms a theoretical justification for the judicial interpretation placed on the First Amendment of 1791 to the Constitution: "The Congress shall adopt no law ... reducing freedom of speech or freedom of the press ...".* But it has to be admitted, in the words of Lord McGregor of Durris, President of the Advertising Standards Authority of London, at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression, that no democratic society has yet removed the obstacles to full freedom of expression and it is improbable that any will do so in the near future.

18. From a realistic standpoint there can be no doubt that at the present time, as the many current processes of democratization testify, reflection about the concept of "democratic necessity" is in most cases a factor for progress inasmuch as such reflection tends towards the abrogation of rules inimical to freedom of expression or helps to forewarn us against arbitrary or impermissible restrictions. The whole value of such reflection lies precisely in combining the three criteria of legality, legitimacy and democratic necessity in order to detect the actions of "those who seek to legitimize abuses against journalists and organs of information", it being understood that protection of freedom of expression cannot be limited to journalists alone.

19. A democratic society, as we have just pointed out, is in a process of continuous change; although that process includes phases of regression, it is also marked by long periods of advancement. The reference to a "democratic society" therefore presupposes, by its very nature, that restrictions on rights and freedoms will be continuously questioned, whether in order to oppose such restrictions or in order to reduce them by steadily entrenching the advances achieved. This will make it easier to understand why the Rapporteurs deemed it important to emphasize this concept. In this sense, democracy is indeed a "tragic" political system, for it is "the only regime that openly faces the possibility of its self-destruction by taking up the challenge of offering its enemies the means of contesting it" (Castoriadis).

20. Hence the purpose of the preliminary report and of this update is not to endorse the system of "restrictions permissible in a democratic society" but to describe it, analyse the risks it presents, and consider how to reduce them as part of a push for more and more democracy. Consequently:

- Firstly, the report was based on the premise that the right to freedom of opinion and expression should be interpreted extensively, in contrast to the limitations which might be imposed upon it, and which should be interpreted restrictively; hence the need to formulate "restrictions on the restrictions";

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* Translator's note. In the absence of the original English text, this passage has been translated from the French.

- Secondly, the report raised the question of derogations in exceptional circumstances by suggesting that, under such circumstances, the right to freedom of expression and information ought perhaps to be placed in the hard core of inalienable rights (paras. 167 and 168), thus supporting the thesis that the system of restrictions necessary in a democratic society should lead to making freedom of expression an inalienable right, within the meaning of the report by Mrs. N. Questiaux, when a state of emergency is declared; in other words that, even in that event, it could not be subjected to restrictions going beyond those permissible in a democratic society in normal times;

- The Rapporteurs accordingly thought that, since limitations could be regarded as permissible only if they respected the standards of a democratic society, it would be appropriate to concentrate on analysing the concept of a democratic society which is discussed in chapter II of the preliminary report. They regard this standard and that of "democratic necessity" as essential factors in determining the limits to the permissibility of restrictions. In view of the current world process of democratization, special attention should be paid to these aspects of the exercise of the right to freedom of opinion and expression with the idea of ultimately developing a normative impetus which, by hemming in the limitations more and more closely, would change the relativeness of the right to freedom of opinion and expression into a right tending towards the absolute.

B. Prisoners of opinion

21. The Commission on Human Rights, in its resolution 1991/42, decided to establish a working group composed of five experts to inform the Commission about cases of arbitrary detention occurring in the world at large. This step is a highly favourable development and one of great importance in protecting the right to freedom of opinion. As stated in the preliminary report (chapter III, and paras. 152 and 153 in particular), in the field of human rights detention is a "high-risk" measure not only as a sanction, which may be disproportionate to the requirements of the maintenance of public order, morality, etc., but also in that, like any universe of confinement, it carries the risk of leading to numerous violations of human rights. Arbitrary detention is by nature a violation of human rights and should be opposed as such. Opposition to it is necessary a fortiori whenever the practice of arbitrary detention affects prisoners of opinion: that is to say, when it is used to reduce people to silence, or directly or indirectly to restrict the right of everyone to freedom of opinion. In other words, any arbitrary detention constitutes a violation and any detention of a person by reason of his opinions is by nature arbitrary.

22. The Special Rapporteurs therefore consider that the whole of their work might be communicated to the Working Group on Arbitrary Detention in order to facilitate its task.

23. They invite the other members of the Sub-Commission to focus their comments on steps that might be taken to free prisoners of opinion and to put an end to this practice, which is especially impermissible in that, in the case in point, the offender is not the prisoner but the person who locks him up. As we have just pointed out, a person imprisoned on the sole grounds that he has expressed his opinion is of necessity detained arbitrarily, unless that opinion was expressed in defiance of a permissible restriction (defamation or advocacy of racism might be an example). In this case, however, the Sub-Commission will perhaps share the Rapporteurs' view that, even if the opinion expressed is open to sanction in virtue of a permissible restriction, that sanction should never go so far as imprisonment.

C. Violations of non-governmental origin

24. At the forty-second session a member of the Sub-Commission said that the fact that the authorities in a given country did not violate freedom of expression did not in itself warrant the conclusion that that freedom was necessarily and fully guaranteed. Even in the countries which regarded themselves as among the most democratic, violations could be - and often were - committed by organizations practising political violence, private groups, or even individuals. It was suggested to the Special Rapporteurs that they should also deal with such violations of non-governmental origin; but the time allowed was too short for them to take up that topic in the present update.

D. The question of contempt of court

25. Another member suggested that the Rapporteurs should go thoroughly into the question of contempt of court in order to think about a restrictive interpretation of that concept. In view of its scope as a measure restrictive of freedom, it was feared that it might come into unduly common use in the courts. There again there was not time to go into the matter.

E. The protection of journalists

26. The desire was expressed that more specific attention should be paid to the protection of journalists (whether or not on mission), among other measures by appointing a Special Rapporteur. It is too early for anything to be said on the subject in the present report; on the other hand the Sub-Commission might at least recommend that the protection of journalists should be taken into account among the "special procedures" of the United Nations by including a chapter on the subject in every annual report.

27. In addition the NGO Reporters Sans Frontières proposed that thought should be given, on the basis of the work already done in that field, to a draft charter of journalists' duties and rights.

F. Other developments

28. The right to freedom of opinion and expression has been supported and strengthened by many developments in 1990 and 1991. The most notable of these are bound up with the sweeping changes that have taken place in the world and

particularly in the countries of Eastern Europe. In those countries, many restrictions and derogations (censorship) which were not even "permissible in a democratic society" have been substantially reduced if not eliminated altogether. These changes have been accentuated by the pluralism gradually extended to political parties and then in the media, in particular as a result of the changes in ownership (of newspapers and radio or television channels) associated with political upheavals. While these processes should of course be encouraged, it will nevertheless be well to remain alert to the possibility of perverse results; for example freedom of opinion should not contribute to the promotion of discrimination or the advocacy of ethnic or racial hatred that any whipped-up nationalism brings in its train.

29. At all events, the positive findings just recorded should not lead to the conclusion that the situation is improving everywhere. According to the 1991 report recently published by the NGO Article 19 on "information, freedom and censorship" in the world, genuine respect for the right of everyone to freedom of opinion and expression continues to present very serious problems. Thus in 62 of the 77 countries examined in that report, persons are said to be in custody for having peacefully expressed their opinions; in the same countries, certain persons and/or their works are still banned by reason of the expression of their ideas. As a result of ethnic and/or religious conflicts, serious restrictions are said to have been placed on freedom of expression in 51 of the countries examined. Of these countries, 37 are said to be governed by state-of-emergency legislation, mainly owing to a situation of struggle against political violence. The legislation in question is said to authorize the Governments concerned to suspend the right to freedom of expression. Censorship is said to be applied in 72 countries.

II. CURRENT PROBLEMS: FREEDOM OF OPINION AND EXPRESSION IN THE CONTEXT OF THE STRUGGLE AGAINST RACISM ON THE ONE HAND AND IN ARMED CONFLICTS ON THE OTHER

A. Freedom of opinion and expression versus the struggle against racism

30. The complexity of the question becomes evident when we analyse restrictions placed on freedom of expression and information, the better to combat racial discrimination.

31. Such restrictions are acknowledged to be permissible in most of the relevant international texts; furthermore an increasing number of countries are allowing them or preparing to allow them, whether they are actually confronted with rising racism (especially in Europe, where it also takes the particular form of revisionism) or with discriminatory behaviour patterns, in particular associated with the stirring up of nationalist designs, or do so for a preventive or even educational purpose.

32. Thus the following countries have recently adopted or supplemented a specific body of legislation: Argentina (1988), Brazil (1985), China (1987), Colombia (1988), Cuba (1987), France (1990), Germany, Federal Republic of (1985), Senegal and Sweden (1989), United Kingdom (1986) and USSR (1990). The following countries have specific legislation in the drafting stage: Australia, Cameroon, Chile, Mexico, Netherlands, Niger, Spain, Sweden and Venezuela.

33. In addition the question of permissible restrictions on freedom of expression in the name of the struggle against racial discrimination has attracted the attention of several non-governmental organizations, some of them specialists in the protection of freedom of expression.

34. The NGO Article 19 recently held a conference on this subject (London, 27 and 28 April 1991). The monthly newsletter of the NGO Reporters Sans Frontières regularly publishes articles on the same topic. 3/ In a communication submitted to the Commission on Human Rights at its forty-seventh session, the NGO International Council of Jewish Women (ICJW) expressed concern at the fact that appeals to racial or religious violence were either tolerated or encouraged by certain authorities in the name of freedom of expression.

35. On the other hand a great many countries see no need for restrictions of this type, either because they claim that the phenomenon of racial discrimination is unknown to them or because they consider it dangerous to prepare "emergency" legislation on the subject and hold that the general provisions of ordinary law are sufficient.

1. What legitimacy can attach to restrictions "necessary in a democratic society" in order to combat racism?

36. The word "legitimacy" is used here in the same sense as in the preliminary report.

37. Generally speaking, freedom of opinion and expression and also freedom of information are protected; in view of this, the expression of racist ideas may perhaps be regarded as an act of disinformation that legitimizes limitations.

38. As the Inter-American Court of Human Rights aptly points out in a decision of 13 November 1985 (para. 70), a society which is not "well" informed is not a truly free society; the Court thus affirms the principle that the right to information requires that the information should be of a certain quality.

(a) The legitimacy, under the international law of human rights, of restrictions imposed to combat racism

(i) The relevant instruments

39. According to article 29 of the Universal Declaration of Human Rights, restrictions on the rights it guarantees in general terms are permissible "solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare". As we pointed out in the preliminary report (paras. 41-44), most of the international instruments subsequently concluded have embodied, in varying degrees of detail, the same grounds for the legitimacy of restrictions.

40. The CSCE document on the human dimension reaffirms in paragraph 9.1 the right to freedom of expression. "This right will include freedom to hold opinions and to receive and impart information and ideas ... The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards."

41. In a general clause on restrictions, the document makes the following point in paragraph 24: "Any restriction on rights and freedoms must, in a democratic society, relate to one of the objectives of the applicable law and be strictly proportionate to the aim of that law." Perhaps it would have been clearer to focus on the legitimacy of the objective? 4/

42. The preliminary report also drew attention to the problems involved in interpreting the grounds for legitimacy (the rights of others, public order, State security and morality) (paras. 124-126).

43. In the case of discriminatory measures, respect for the rights of others is directly concerned. The rights of others may be understood in this context to mean the right to equality but also the right to dignity and to protection against degrading treatment, or again the right to information. On the other hand, recourse to the idea of "public order", the boundaries of which are often ill-defined, presents more of a problem; in view of its vagueness, there is a great temptation to pray it in aid in irrelevant circumstances, thus committing in reality a perversion of legitimacy.

44. The grounds for restrictions connected with State security will be specifically considered in section B, dealing with freedom of expression in situations of armed conflict.

45. The notion of morality appears prima facie to be in keeping with the spirit proper to anti-racist legislation; but it carries in embryo the risk of outlawing something which is merely not accepted by everybody. The idea of a moral consensus justifying restrictive measures may carry the germ of a moral dictatorship. There is no need here to labour the dangers inherent in the will to impose a moral order - Nazism is still in all our minds - or to emphasize how dangerous it would be to plead morality in order to restrict freedom of expression.

46. Among the grounds that may be advanced for restrictions, only the concept of the rights of others, the boundaries of which are fairly clearly defined, seems apt to justify the restrictions needed in the struggle against racism. Furthermore, from the standpoint of legal technique, the reference to the rights of others affords a better basis for the strictness desirable in defining offences inasmuch as the protection of those rights involves a prejudice, which might be no more than hypothetical, and hence a right to compensation, if only of a moral nature. The number of behaviour patterns concerned would thus be strictly limited and the risk of extending the field of repression to the criminalization of mere departures from the prevailing norm would be neutralized. Lastly, it is less dangerous to freedoms to impose restrictions with the aim of reconciling conflicting rights.

47. Moreover the explicit or implicit reference to the rights of others finds an echo in certain restrictive provisions laid down in the general interest by the international instruments.

48. Thus article 29, paragraph 3, of the Universal Declaration of Human Rights provides that "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations". This provision is supplemented by article 30, which reads as follows: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

49. The International Covenant on Civil and Political Rights states the same principle in the same terms in its article 5, paragraph 1.

50. The American Convention on Human Rights lays down the same rule in its article 29: "No provision of this Convention shall be interpreted as: (a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein." The same applies to article 17 of the European Convention on Human Rights, article 29 of the Universal Declaration of Human Rights and article 5 of the International Covenant on Civil and Political Rights, which use the same language.

51. At the conference already mentioned which was held by the NGO Article 19, the American Civil Liberties Union rightly emphasized that article 5 of the International Covenant and article 17 of the European Convention might justify, in the name of the rights of others, restrictive measures for the purpose of combating racial discrimination.

52. Furthermore attention was drawn to the scope of the principle embodied in article 20 of the International Covenant, which provides that: "Any propaganda for war shall be prohibited by law" and that "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". There can be no better way of legitimizing restrictions to combat advocacy of racial hatred and incitement to discrimination.

53. The reader will need no reminder that the right to non-discriminatory treatment clearly constitutes a fundamental right of the human being, guaranteed by all the international instruments on human rights and the subject of a specific United Nations instrument which entered into force on 4 January 1969: the International Convention on the Elimination of all Forms of Racial Discrimination, known as the CERD Convention. Under article 4 of that Convention, the States Parties have undertaken to adopt positive measures designed to eradicate all incitement to racial discrimination. Such positive measures may involve restrictions on freedom of expression, for the States undertake more specifically to: "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination," etc.

54. Thus this Convention does not confine itself to legitimizing restrictions; it goes on to state that in certain cases those restrictions may be backed by criminal penalties. It will be appropriate to return to this point and to give it special attention in connection with the criterion of democratic necessity which, in the interests of respect for human rights, presupposes inter alia proportionality of the restriction to the legitimate objective pursued. Only article 20 of the International Covenant on Civil and Political Rights and article 4 of the CERD Convention constitute specific instruments legitimizing limitations of or derogations from freedom of expression by indicating precisely what behaviour patterns justify such restrictions.

55. Here again, what is meant is propaganda for or advocacy of hatred, incitement to discrimination, hostility and violence and the dissemination of ideas based on racial superiority or hatred. This list, which appears to assume that the culpable behaviour will receive some publicity, refers by implication to the notion of indoctrination and to that of false information or disinformation.

56. Is it fair to conclude from this that freedom of expression might find grounds for a limitation in the right to be well informed? In other words, the right to be well informed might serve as grounds for sanctioning the dissemination of revisionist ideas or of an ideology based on the superiority of a particular race. On this last point it would be desirable that international instruments, before justifying measures that restrict freedom of expression, should perform their educational function properly by avoiding the use of such a term as "race" which, when applied to human beings, has no scientific meaning. Unequivocal recognition of the human race as one and indivisible appears to be regarded as the indispensable preliminary for the struggle against racism.

(ii) Decisions of international and regional authorities on protection

The Human Rights Committee

57. The Human Rights Committee has handed down few significant decisions on the subject. Of 18 selected decisions delivered by the Committee in connection with article 19, only two decisions relate to racism.

58. First case: Request 117/81 M.A. v. Italy was declared inadmissible ratione materiae by the Committee on 10 April 1984. The author of the request did not specify what articles of the Covenant he considered to have been violated. The facts were as follows: in 1971, when he was 15 years old, the applicant joined the Movimento Politico Ordine Nuovo; when this organization was disbanded in 1973 he joined the Movimento Sociale Italiano. After being prosecuted in 1974 he was sentenced in 1976 to four years' imprisonment. Before the Committee the Italian Government relied inter alia on article 19, paragraph 3, of the Covenant, arguing that the protection of national security and public order was a legitimate objective. The Committee took the view that the acts alleged against the applicants were of such a nature as to be removed from the protection of the Covenant by the operation of article 5 thereof and that in any case their prohibition was justified by article 19, paragraph 3.

59. Second case: Request (104/1981) of J.R.T. and the W.G. Party v. Canada (declared inadmissible by the Committee on 6 April 1983). The so-called "W.G." Party and the applicant were circulating, by transmitting tape-recordings over the telephone, particularly serious anti-Semitic messages. The Party's and the applicant's telephones were cut off on the basis of the Canadian Human Rights Act, which declares it a discriminatory practice to communicate telephonically any matter likely to expose a person or persons to hatred or contempt by reason inter alia of their religion or "race". The State Party held that the disputed provisions were designed to give effect to article 20 of the Covenant and that, in contrast, the author's "right" to communicate racist ideas was not protected by the Covenant.

60. The Human Rights Committee took the view that the ideas which the applicant sought to disseminate through the telephone system clearly constituted the advocacy of racial or religious hatred which Canada had an obligation under article 20 (2) of the Covenant to prohibit. It should be noted that the Committee was guided in one of the decisions by article 19, paragraph 3, and in the other by article 20, which directly legitimizes such measures without requiring it to be proved that the restriction applied on its authority is designed to protect the rights of others, public order or other legitimate objectives.

The European Commission of Human Rights

61. The European Court of Human Rights has made no explicit ruling on this question but defined the scope of article 17 of the European Convention in its very first decision (Lawless, 1 July 1961), stating that the purpose of article 17, in so far as it referred to groups or persons, was to make it impossible for them to derive from the Convention any right to engage in any activity or perform any act aimed at the destruction of any of the rights recognized in the Convention.

62. The European Commission, for its part, has delivered several interesting decisions. Firstly it should be noted that, unlike the United Nations texts, article 14 of the European Convention guarantees non-discrimination only in the exercise of a right specifically protected by the Convention. 5/ To widen this unduly narrow setting, the Commission tried, in virtue of article 3 which prohibits inhuman or degrading treatment, to give the protection of non-discrimination an independent scope of its own in these terms: "Without prejudice to article 14, discrimination based on race might under certain conditions constitute per se degrading treatment within the meaning of article 3 of the Convention"* (10 October 1970 - Ann. 13, p. 995, Asiatiques d'Afrique orientale).

63. Reference will be made here to four of the Commission's decisions which are essential in this connection. The facts on which the first decision is based are very similar to those described in request No. 117/81 to the Human Rights Committee which has already been cited. The second case concerns remarks deliberately made during an election campaign. The last two cases are concerned with revisionism.

64. First case: request (6741/74) v. Italy concerning articles 10 and 11 of the Convention and also article 14. The Commission took the view that making it a criminal offence to engage in intrigue aimed at reconstituting a fascist party was necessary to public safety and to protection of the rights and freedoms of others. Combining article 14 with article 10, it held that a difference in treatment reserved to those who were guided by fascist ideology had a legitimate purpose: namely, to protect democratic institutions. An implicit reference to article 17 of the Convention should doubtless be seen in this.

65. Second case: request (D 8348/78 and 8406/78), Glimmerveen and others v. Netherlands. The aim was to obtain a finding of violation of article 10 of the Convention and of article 3 of the First Protocol guaranteeing free elections under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The applicant was Chairman of the Nederlandse Volks Unie, a party supporting, in particular, the idea that it is in the general interest of a State for its population to be ethnically homogeneous. He was sentenced to two weeks' imprisonment for circulating tracts addressed to "Netherlanders of the white race" and containing such passages as the following: "The majority of our population have long since had enough of the presence in our country of hundreds of thousands of Surinamese, Turks and other immigrant workers - 'guest' workers as they are called - with whom, furthermore, there is nothing we can do here".

66. The authorities held that the content of the tract could not be described as factual information and that it constituted incitement to racial discrimination on the understanding that the notion of race included that of

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* Translator's note. In the absence of the original English text, this passage has been translated from the French.

ethnic group. (The tracts were confiscated and the electoral lists bearing the applicant's name were invalidated.) The Government drew the Commission's attention to the international obligations of the Netherlands under the CERD Convention.

67. The Commission held that the duties and responsibilities referred to in article 10, paragraph 2, found clearer expression in a more general provision, namely article 17 of the Convention.

68. The European Commission took both the CERD Convention and article 17 of the European Convention as its guide in ruling that the applicants might not invoke the provisions of article 10 of the Convention, and in declaring the request incompatible with the provisions of the Convention within the meaning of article 27, paragraph 2, and therefore inadmissible (11 October 1979). The recourse to article 17, in the same way as recourse to article 5 of the International Covenant, made it unnecessary to prove legitimacy on grounds of public order, the rights and freedoms of others or other grounds.

69. The other two cases concern revisionism.

70. Third case: request (No. 9235181) of X v. Federal Republic of Germany. The applicant complained against a judicial decision forbidding X to exhibit brochures according to which the murder of millions of Jews under the Third Reich was a lie or a piece of Zionist trickery. The authorities were guided by the texts making defamation an offence and it was specified that the ban was limited to the denial of the murder of millions of Jews. The Commission held that the murder of the Jews was a "known historic fact" established beyond doubt by overwhelming proof of all kinds. It therefore considered that the protection of the reputation of others legitimized the restriction.

71. Fourth case: the case was more complex because the author of the request (No. 9777/82), T v. Belgium, was not the direct author of the revisionist remarks. The applicant was acting as the "author-publisher responsible" for the publication of a text written by a former leader of the Belgian Rexist movement, who had been convicted of communicating with the enemy and deprived of "the right to participate in any capacity in the running, administration, writing, printing or circulation of a newspaper or any other publication in the event that such participation is of a political nature".

72. This document, entitled "Letter to the Pope concerning Auschwitz", contained a commentary calling into question the reality of the extermination of millions of Jews at Auschwitz and elsewhere and reducing the enormity of the Nazi atrocities by comparison with other wartime atrocities. The domestic authorities took the protection of morality and the rights of others and the defence of order as their guide in sentencing the applicant to one year's imprisonment and a fine of 10,000 francs and declaring the offending brochures confiscated.

73. The European Commission observed that the applicant had been prosecuted, not as co-author of an offensive piece of writing, but for having participated

in the publication of a piece of writing despite the fact that its author had been deprived of his rights. The Commission accordingly considered that the restriction on freedom of expression was necessary to the defence of order and to safeguard the authority of the judiciary.

74. Here article 10, paragraph 2, provided the Commission with sufficient grounds for legitimizing the restrictions. Does this mean that article 17 can only be relied upon when the threat to the democratic society reaches a certain degree of seriousness? This question will be considered later on during the appraisal of the criterion of the "democratic society" and its corollary, the criterion of proportionality.

(b) The legitimacy under municipal law of restrictions designed to combat racism

75. Here the Rapporteurs have essentially referred, firstly to the reports submitted by States parties to the Committee on the Elimination of Racial Discrimination (CERD), secondly to the report on freedom of the press throughout the world prepared by the NGO Reporters Sans Frontières in 1991, and lastly to the information collected at the conference already mentioned which was organized by the NGO Article 19.

76. Although almost all countries which have a written Constitution guarantee the right to equality and non-discrimination, the constitutional protection of that right is in most cases confined to nationals. Valid grounds for legitimacy must therefore be sought in individual statutes.

77. A number of countries consider, as we have already pointed out, that there is no need to refer to specific pieces of legislation in order to combat racism, either because offences under ordinary law make is unnecessary to have special legislation on the subject or because - according to them - they have no problem of racial discrimination. The question then arises whether such countries ought nevertheless to enact specific legislation even though it meets no criteria of legitimacy save that of abiding by the commitments made under the CERD Convention.

78. The criterion of democratic necessity, which is intended to preclude perversions of legitimacy, should not be used as a mere endorsement. For example, since a coup d'état in one country, the newspapers are no longer allowed to publish information which is "liable to inflame racial problems (between one ethnic group and another) or prejudicial to peace and order". Consequently most journalists are compelled to practise self-censorship, whereas the question is one that would be worth discussing democratically. In another country the head of the State security apparatus is said to have invited journalists "to write no more articles likely to upset the highest authorities of the country", thus progressively installing a mandatory prior censorship that makes it an offence to "publish articles dealing with social, regional and ethnic differences".

79. In contrast, several countries report that they have never, or almost never, had to apply provisions permitting restriction of freedom of expression

on the grounds of the struggle against racism: Australia (5 of the 26 complaints filed between 1986 and 1987 for racial discrimination interfere with freedom of expression), Chile, Cuba, Hungary, India, Jordan, Luxembourg, Mongolia, Morocco, Norway, Pakistan and Philippines. 6/ Apart from countries with a "multiracial" and "multiethnic" composition, 7/ it appears to be mainly in European countries that restrictive provisions take into account the criterion of proportionality on which the application of the principle of democratic necessity is based.

80. The legitimacy of restrictions is thus assessed in a manner which varies widely from country to country, and it is noted that the principle of democratic necessity canalizes the scope of the other two principles, that of legality and that of legitimacy.

2. The scope of the principle of democratic necessity

81. The preliminary report drew attention to some criteria relating to the concept of the democratic society such as pluralism, tolerance and the spirit of openness.

82. It will be noted that these criteria are two-edged; they may equally well justify total freedom of expression as permit limitations on that freedom with a view to preserving it, without going so far as to maintain, for example, that in a free society tolerance requires us to tolerate the intolerable. The risk is that censorship or restrictions imposed on the expression of opinions held by the majority today to be intolerable may in reality catch only marginal ideas that might be legitimate tomorrow: no one knows in advance what social, moral or intellectual evolution may become desirable or possible for the future of mankind.

83. The principle of democratic necessity therefore needs to be defined in the light of comparative law and with reference to the rights expressly guaranteed by the international instruments on the protection of human rights.

84. Comparative law shows that many countries have adopted specific and restrictive bodies of legislation in order to combat racism. It should perhaps be mentioned that the First Amendment to the United States Constitution, cited by a handful of neo-Nazis who had been refused permission to demonstrate, enabled them to win their case. A recent decision by the United States Supreme Court, however, although directly concerned not with combating racism but with the right to information, shows that the American legal system also accepts limitations. The Supreme Court, on examining an appeal on grounds of inconstitutionality against a decision prohibiting the rebroadcast of recorded telephone conversations between General Noriega in prison in Miami and the outside world, confirmed the original judgement. 8/ Thus the highest legal authority in the United States, by not invalidating an injunction reductive of freedom of the press, confers on freedom of expression a relative and not absolute character.

85. Lastly it should be noted that most specific bodies of legislation in so-called democratic States remain silent about the criteria that characterize

a "democratic society", with particular reference to the pre-eminence of law and the criterion of proportionality; the same applies to the relevant international instruments.

86. There are three possible situations of principle. Does the pre-eminence of law require that offences should be precisely defined in all their constituent elements? Does the criterion of proportionality entail weighing legitimacy of restriction against legitimacy of expression? Lastly, does proportionality preclude unduly severe restrictions or, more specifically, does it fix a threshold which cannot be undercut without threatening the very existence of freedom of opinion and expression?

(a) The definition of offences and the pre-eminence of law as a democratic necessity

87. Defining racism in terms compatible with the principle of a democratic society is a complex and difficult undertaking, as will be apparent from a study of the relevant international instruments, namely the International Covenant on Civil and Political Rights and the CERD Convention.

88. The Human Rights Committee, in a general comment on non-discrimination (CCPR/C/21/Rev.1/Add.1), after mentioning the absence of any definition in the Covenant, reproduced the definition given in article 1 of the CERD Convention and took the view that the term "discrimination" as used in the Covenant should be interpreted on the same lines, that is to say when it has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by all persons, on an equal footing, of all human rights and fundamental freedoms.

89. Discrimination, then, will be defined by its effect or intended purpose. The reference to "purpose" presents a difficulty, for in this field it is hard to distinguish from motive. In many legal systems, motive - which differs from intention - cannot be taken into account in defining an offence; taking it into account as a constituent element of an offence is generally regarded as a characteristic of totalitarian societies, and considering only the effect irrespective of the intention is regarded as a characteristic of authoritarian societies. This aspect of the problem demonstrates once again the vital importance of the criterion of a democratic society as a condition for the satisfactory functioning of standards designed to combat racism and racial discrimination. Furthermore defining racial discrimination as discrimination based on "race" and "ethnic" origin would merely increase the difficulty: how, in a democratic society, can we even attempt to define "race" or "ethnic group"? Besides, article 20 of the International Covenant calls for the prohibition of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Here incitement is made the main punishable act. Similarly article 4 of the CERD Convention requires States to make it an offence, apart from the dissemination of ideas, to engage in incitement to, provocation of and assistance in racist activities.

90. While the last-mentioned behaviour falls within the traditional definition of complicity, the definition of racist activities as the principal act remains an open question, while the idea of dissemination appears to require the existence of some form of publicity to represent the material element.

91. As to restrictions, the reports of States Parties to the CERD Convention show that in most instances they are couched in somewhat vague terms. Few countries mention publicity as representing the material element (Austria, Barbados, Denmark and Kuwait). For some, publicity is not even a constituent element (Sweden). Similarly, few countries refer to intention (Austria, Barbados, Belgium, Denmark and New Zealand). Some legislations work on the basis of the element of intention, a reversal of the burden of proof (France and United Kingdom).

92. Aggravating circumstances may be prescribed for non-specific offences, depending on the motive (Argentina) or the intended victim (Algeria). In the case of specific offences, publicity may also be accepted as an aggravating circumstance (Czechoslovakia).

93. Lastly, some legislations feature revisionism (France and the Federal Republic of Germany). French law in particular defines revisionism by express reference to the definition of crimes against numanity given in article 6 of the Charter of the Nürnberg Tribunal annexed to the London Agreement.

94. The Rapporteurs are in favour of an exchange of views with CERD, at a forthcoming meeting, on the definition of offences.

(b) <u>The criterion of proportionality as applied to the legitimacy of restriction and the legitimacy of expression</u>

95. Applying the principle of proportionality necessarily entails passing a value judgement on the ideas expressed, which is not the least of the difficulties - indeed, not the least of the dangers - of imposing restrictions. The interest of the person to whom the expression is addressed is taken into account.

96. Whatever degree of precision the legislator may achieve, the decisive role remains that of the judge. Even so, as we have just seen, the French Act just quoted (1990) referred back to the definition given in the Charter of the Nürnberg Tribunal and further provided that penalties would be applied only for disputing the reality of crimes against humanity whose perpetrators had been convicted by a French or an international court; the purpose of this was to avoid a situation in which, in a press trial instituted to investigate whether writings or remarks fell within the scope of the Act, the judge would find himself having to act as an historian, which would be clearly outside his competence.

97. Before the Act in question was passed in 1990, the judge (in the Faurisson case) had already found it necessary to specify that "it was not for him to confirm history or, in consequence, to take sides for or against the theses put forward by the accused", and he confined himself to a finding of defamation.

98. Can it be argued that only deliberate disinformation could justify restrictions? Between the extremes of avowed opinion and true information by way of disguised opinion, tendentious information and information about opinions, the difficulty of appraisal will be readily apparent.

(c) The criterion of proportionality as applied to the extent of the restriction by comparison with the seriousness of the behaviour

99. Article 4 of the CERD Convention enjoins States Parties to declare that the behaviour patterns it defines are offences. In most so-called democratic States, however, an offence can be defined, as we have seen, only through the characterization of an element of intention; and it is specifically this element of intention that imparts a degree of seriousness to the offending behaviour.

100. The aforementioned article 4 no more specifies the nature of the criminal penalties required than their degree of seriousness. In this connection, the question of imprisonment calls for some discussion inasmuch as it raises a problem of principle with regard to the criterion of proportionality. Can the abuse of expression really justify deprivation of liberty? Furthermore, apart from the fact that some legislations analysed in the reports of States Parties to the CERD Convention set the maximum penalties very high, and when we know to what abuses resort to imprisonment can give rise, ought not this form of penalty to be called seriously into question in the context of the present report?

101. Does not the trial that precedes the passage of sentence rather than the penalty itself, perform an educational function which is essential in this connection? Resort to the penalty of imprisonment also raises the question of its effectiveness. In view of its gravity, is there not a risk that the judges will either be reluctant to impose that penalty where they have found the perpetrator guilty, or be wary about finding that offences have been committed - which, as we have seen, is a possibility in view of the somewhat vague definition of the offences. The difficulty is illustrated by the regrettable example of a decision taken by Belgian judges who refused to qualify the term "bougnoule" as racist and decided that it meant "badly dressed".

102. But the non-effectiveness of a criminal penalty greatly reduces its educational and preventive function (see the report of the Council of Europe on decriminalization, 1980) when it does not produce the opposite effect to that intended.

103. Suspension of the right to be elected or a fortiori of the right to be a newspaper editor - other criminal penalties which can be contemplated - raises serious questions, in particular when the offender is not directly to blame, which in the case of newspaper editors is most often the case. The Rapporteurs' opinion is that these penalties should be imposed only as a deterrent, i.e. at the end of a period of multiple recidivism, implying that the offender called upon to cover the offending passages with his responsibility has in a sense been repeatedly warned to cease and desist.

104. On the other hand the right of reply - regarded as a criminal penalty, not merely as civil redress, and very widely extended to associations - and publication of the convicting judgement would not present any difficulties with regard to the principle of proportionality; the Rapporteurs encourage these measures.

105. To conclude on this point, the Rapporteurs wish to emphasize that resort to criminal penalties - accompanied by the reservations just expressed - should form part of a comprehensive policy which gives priority to the educational and preventive approach. 9/

B. Freedom of expression and information in armed conflicts: the example of the "Gulf war"

106. The preliminary report suggested that particular attention should be paid to restrictions on freedom of expression imposed by reason of exceptional circumstances, and raised in that context the question of including freedom of expression in the hard core of inalienable rights.

107. The "Gulf war", the keen controversy about freedom of expression and information that arose out of it, and the lively reactions in certain professional journalistic circles and in specialized non-governmental organizations (NGOs) 10/ restored its topicality, in connection with military censorship in time of war, to the question of justification and limits relating to the restrictions placed on freedom of expression in virtue of exceptional circumstances. In the case in point, this question became particularly acute.

108. In view of the specific nature of the kind of exceptional circumstances represented by a state of war, recourse to the mechanism prescribed for such circumstances by article 4 of the Covenant (and by article 15 of the European Convention and article 27 of the American Convention) does not seem appropriate to the situation, at least so far as the requirements of the principle of legality (notification) are concerned.

109. As we suggested in the preliminary report (para. 48), this question should be studied in the light of the criteria identified in the report by Mrs. N. Questiaux on states of emergency (E/CN.4/Sub.2/1982/15). For the sake of clarity in what follows, we shall keep to the criteria previously applied, namely: the principle of legality (formalities of proclamation and notification), the principle of legitimacy (exceptional threat) and the principle of democratic necessity (proportionality, non-discrimination and inalienability of certain fundamental rights such as the prohibition of torture).

1. The principle of legality according to the Covenant and its inappropriateness to war situations

110. From the standpoint of the principle of legality, the only formal procedure required by article 4 of the Covenant (and by article 15 of the European Convention and article 27 of the American Convention) is completion of the formalities of proclamation at the national level and of notification at the supranational level.

111. Comparative study of legal systems shows that they almost always include emergency, or war, legislation or special powers comprising rules which verge on restrictions of freedom of opinion and more particularly of expression. 11/ When these emergency measures are applied, the fact that they were already on the statute book does not exempt States from compliance with the formalities of proclamation and notification.

112. Yet to our knowledge, when war broke out in the Persian Gulf, none of the belligerents - which, moreover, are Parties to the Covenant - and specifically none of the countries of the "coalition" observed these formalities, although measures clearly restrictive of freedom of expression (measures of military censorship) were taken. The formality of the so-called "declaration of war" is no longer required by positive international law; hence the de facto existence of an armed conflict is sufficient to render respect for the Geneva Conventions of 1949 on humanitarian law applicable against the parties to the conflict. The inappropriateness of article 4 of the Covenant, to which reference has already been made, lies in this.

113. On another point, in contrast, article 4 (article 15 of the European Convention and article 25 of the American Convention) imposes a specific requirement with reference to the principle of legality: the derogative measures must not be "inconsistent with their other obligations under international law", and hence with those which may flow from other international instruments.

114. To take the aforementioned Geneva Conventions as our guide: the High Contracting Parties undertake in article 1 (which is common to all four Conventions) not merely to respect those Conventions but also - and more important - to ensure that all other High Contracting Parties respect them in all circumstances; each one thus binds itself in relation to the rest, and vice versa. These obligations include, for example, respect for various measures to protect the civilian population and in particular the prohibition of indiscriminate bombing.

115. The question to be answered, therefore, is: how far can the permissible restrictions or derogations, and in particular military censorship in wartime, constitute an obstacle to the monitoring of respect for the obligations which the High Contracting Parties have assumed pursuant to that common article 1? In other words: how, in the absence of information, can we satisfy ourselves that these requirements are being complied with?

116. The question must now be considered in relation to the principle of legitimacy (exceptional threats).

2. The principle of legitimacy according to the Covenant and its inappropriateness to war situations

117. Under the heading of exceptional circumstances, article 4 of the Covenant refers to a "public emergency which threatens the life of the nation". Similarly article 15 of the European Convention provides that the derogation clause may apply "In time of war or other public emergency threatening the

life of the nation"; article 27 of the American Convention allows the suspension of guarantees "In time of war, public danger, or other emergency that threatens the independence or security of a State Party".

118. Since these texts limit public freedoms, they can only be given a restrictive interpretation. The European Court, in the Lawless case (1961), took the view that the normal and habitual meaning of the words "In time of war or other public emergency threatening the life of the nation" was clear enough; they referred to a situation of crisis or an exceptional and imminent danger that affected the entire population and constituted a threat to the organized life of the community that made up the State. Are we to conclude from this that the expression "state of war", to which the drafters of the Covenant avoided all reference, is absorbed by the expression "public emergency which threatens the life of the nation"?

119. Although the European Commission on Human Rights and all the literature on the subject have rejected, for the purposes of article 15, the requirement of a situation of total war, i.e. of an armed conflict threatening "the very life of the nation, that is to say its frontiers and internal order, its economy and culture and the life and liberty of its citizens", 12/ it nevertheless follows from the wording used in the international instruments that the threat must be direct, otherwise article 4 of the Covenant (like article 15 and article 27 aforementioned) is not applicable. That would apply, for example, to a war waged at a distance from the national territory. The possibility of restrictions or derogations in connection with such a war therefore appears to be precluded within that territory. That was the case, for example, with the war in the Falkland Islands (Malvinas), during which it was noted that the United Kingdom appeared to have refrained from any restrictive measures on its home soil. 13/

120. In the "Gulf war", where the coalition countries were in action far from their own territory, it consequently appears to us that - from the standpoint of the principle of legitimacy - article 4 of the Covenant (togethor with the corresponding articles) was inappropriate to justify any derogations from freedom of expression and information.

121. The notion of exceptional circumstances does not constitute a legitimate purpose as such. It should be appraised for application to the principle of legitimacy only in terms of the notions of national security and public order; save in special circumstances, this means a conflict at the frontier or on the national soil. We may cite as an example of special circumstances the decision (D.7050/75) of the European Commission on Human Rights, which held in the Pat Arrowsmith case that the criminal prosecution of a person who was distributing tracts inciting soldiers to desert, and who declared that he wished to continue that activity contrary to the objectives enumerated in article 10, paragraph 2, of the Convention, constituted a necessary measure in a democratic society, since desertion by soldiers constituted a threat to national security and to order in a social group. It may logically be inferred that the solution adopted would be applied irrespective of the geographical location of the conflict.

122. On the other hand, the notion of the rights of others may justify certain restrictions, again irrespective of the geographical situation of the conflict. For example it legitimizes the ban on exposing prisoners to public curiosity (art. 13, second para., of the Third Geneva Convention of 1949) or censorship motivated by concern to protect human life.

123. Although jurists are divided as to the legitimacy of restrictions in the event of armed conflict, paradoxically this question is less controversial in professional journalistic circles. This at all events is the conclusion drawn from a sample survey taken by the NGO Reporters Sans Frontières at the time of the "Gulf war", 14/ according to which 63 per cent of the journalists questioned considered military censorship normal in wartime while 78 per cent considered that journalists should censure their own writings. In the view of 78 per cent of them, the legitimacy of such censorship lay in the protection of human life, and in that of 77 per cent in the risk of informing "the enemy". Only 15 per cent mentioned the morale of the armies.

124. This picture calls for some qualification, for an overwhelming majority (84 per cent) considered themselves to have been manipulated during the "Gulf war". Furthermore the sample survey brought out the difficulty of drawing the dividing line between the inherent requirements of the armies' morale and pro-war propaganda. The following were cited as examples of manipulation in the form of information or pictures retransmitted worldwide: the testimony of a bogus bodyguard of Mr. S. Hussein; the clip of a cormorant in an oil spill; the Iraqi "Maginot line"; information vaunting the power of the Iraqi army, the alleged disconnection of incubators in Kuwait; and the torture of a pilot after he had been injured by an ejection seat. It would have sufficed to mention some cases in which there manifestly was ill-treatment; any measures that carry the risk of being identified with manoeuvres of disinformation had no legitimacy save to justify the war. 15/

3. The principle of democratic necessity as a factor in promoting humanitarian law and the return to peace

(a) The principle of democratic necessity and the promotion of humanitarian law

125. This principle, the reader will recall, is based on the criteria of proportionality, non-discrimination and the inalienability of certain fundamental rights such as the prohibition of torture.

126. So far as the criterion of proportionality is concerned, the difficulty lies in striking the right balance between the measure of restriction or derogation (total censorship) and the military imperatives of the conflict.

127. In other words, much as a restriction in the form of partial censorship or a derogation in the form of total censorship seems permissible while a military operation is in preparation and then in execution, it is difficult from the standpoint of the principle of "democratic necessity" to justify maintaining the restriction or censorship when the operation is over. Freedom of opinion and expression should then be restored through the intermediary of freedom of information in order to make known, for example, what has become of

the civilian populations, the wounded or the prisoners of war. The application of censorship by the "loser" on the one hand, "to preserve the morale of the troops", and by the "winner" on the other hand, in order to evade all monitoring of possible violations of humanitarian law (such as the treatment of the civilian populations, for example after a bombarding attack), seems to us to conflict with respect for the principle of democratic necessity and hence should never be countenanced.

128. What justification can there be, for example, for a government authority denying journalists access to prisoner-of-war camps, shelters and hospitals when there is no longer any risk to their lives or to those of the victims?

129. What justification can there be for a television channel to "incite" its journalists to "avoid creating needless distress" by ruling out close-ups and gruesome sights connected with, say, an attack with chemical weapons? Is there not a risk of disinformation in giving credance, by omission, to the idea of a "clean war"?

130. Another risk is that the principle of non-discrimination will be breached by the intensive - or even permanent - use of the pooling system, since the composition of the pool is often based on disputed or even discriminatory choices. Restrictive measures should be appraised limitation by limitation; some restrictions or derogations, such as the use of pools, can be justified only temporarily even if the conflict is prolonged.

131. To conclude on this point, the Rapporteurs suggest that, so far as the principle of democratic necessity is concerned, restrictions and derogations should not be of such a nature as to thwart the purposes of humanitarian law, especially since humanitarian law regards as inalienable certain fundamental rights which are protected by the common article 3 of the Geneva Conventions (prohibition of torture, etc.).

132. Concern not to give strategic information away to the enemy is perfectly justifiable, but it can only be temporary; in virtue of the criterion of proportionality, as soon as the risk of informing the enemy or endangering human life has disappeared, it is well to be able to bring fully to light any violations either of inalienable rights or of the rights and principles laid down in the Geneva Conventions of 1949 and their Additional Protocols of 1977.

133. Where it has not been possible to preclude such violations it is necessary, in a democratic society, to be able to denounce them so that they may be punished.

134. In this connection we have two observations to make concerning the role of public opinion in the context of armed conflicts. Firstly, public opinion is a highly effective instrument for preventing various violations of international standards (torture, use of chemical weapons, indiscriminate bombing, attacks on civilian populations, misuse of protected international emblems, etc.); publicity is therefore needed most of all to prevent such practices. The second observation, which is indirectly connected with the present study, concerns the role of public opinion in preventing armed conflicts and public condemnation of the use of force as a sanction. In this

connection the reader will recall the words of United States President Woodrow Wilson, who envisaged making world public opinion a "cog in the machinery of sanctions based on collective security". 16/

(b) The principle of democratic necessity and the promotion of peace

135. The Rapporteurs propose that the criterion of proportionality should also be appraised bearing in mind that, while the principle of democratic necessity may justify the imposition of restrictions or derogations, that possibility should be offset by requirements for a return to democracy (state of emergency) or peace (state of war). The aim of emergency legislation is, by its very nature, to make it possible to institute measures designed to restore peace; such legislation is thus of necessity provisional in character and limited in time and should be abrogated as soon as it has achieved its purpose: to put an end to the period of tension.

136. On the same lines, the principle of democratic necessity should be examined in the light of article 5, paragraph 1, of the Covenant 17/ and article 17 of the European Convention, 18/, from neither of which is any derogation permitted. We may also mention article 72, paragraph 2, of the Vienna Convention on the Law of Treaties, which provides that "During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty".

137. In other words, as the aforementioned report by Mrs. N. Questiaux made clear, in the event of exceptional circumstances the aim pursued by restrictions and derogations should be to favour the return to democracy and, in the event of armed conflict, the return to peace. By "democratic necessity" the Rapporteurs thus mean that, in the event of war, restrictions to and derogations from freedom of expression should in some degree have as their purpose, in the last resort, the return to peace, and any measure that would interfere with that purpose would not respect the principle of proportionality and hence would not be permissible.

Notes

1/ Entitled respectively "Chapter I. Proposals for an interpretation of the legal regime governing the right to freedom of opinion and expression" and "Chapter II. Democratic processes and the elaboration of the concept of democratic society".

2/ Chapter III: "The question of permissible restrictions".

3/ See in particular Nos. 16, 17, 18, 22 and 24 for 1990 and 1991.

4/ See for example paragraph 9.5 concerning the right of everyone to leave his country and to return to it.

5/ Recently the Parliamentary Assembly of the Council of Europe again recommended that a general clause on non-discrimination should be introduced into the European Convention on Human Rights (Rec. 1134/1990), thus bringing it into line with the standards of the Covenant, which includes such a general clause.

6/ See the periodic reports to CERD.

7/ Such as New Zealand; see in particular the CERD report of 19 June 1990 (C/1984/Add.5, paras. 194-198).

8/ Decision of 18 January 1990. Cited by Reporters Sans Frontières, 1991, p.73.

9/ In this connection mention may be made of the lines pursued in France by the National Advisory Commission on Human Rights which, in its report to the Prime Minister (1990), addresses itself essentially to prevention and allows punishment only a quarter of the chapter on responses to racism.

10/ Reporters Sans Frontières: "La presse en état de guerre", 1991; Article 19: Bulletins of February and April 1991.

11/ With regard, for example, to France, the United States, the United Kingdom or the Federal Republic of Germany, see: Reporters Sans Frontières, "La presse en état de guerre", 1991.

12/ See op. Sustertenn, Rapp. Comm. 19/12/1959, Lawless.

13/ R. Ergec, "Les droits de l'homme à l'épreuve des circonstances exceptionnelles", Brussels, 1987.

14/ Reporters Sans Frontières Letter No. 23.

15/ Reporters Sans Frontières, French television channel A2, programme Sept sur Sept of 14 March 1991.

16/ P. Guggenheim, "L'organisation de l'opinion publique dans la communauté internationale", Annales d'études internationales, Geneva, 1970, p. 155. Quoted by M. Veuthey, Guérilla et droit humanitaire, Institut Henri Dunant, Geneva, 2nd. ed., 1983, p. 343. In the absence of the original English text, the quotation from President Wilson has been translated from the French.

17/ Art. 5, para. 1: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

18/ Wording identical with that of art. 5, para. 1, of the Covenant.